In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-963

FIRST NATIONAL BANK OF FAYETTEVILLE, ET AL,
PETITIONERS,

v.

JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AND NORTHWEST NATIONAL BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

Petitioners challenge the court of appeals' ruling that the Comptroller of the Currency's approval of a national bank charter application was not arbitrary, capricious or otherwise contrary to law.

Petitioners, nine financial institutions in the vicinity of Fayetteville, Arkansas, brought this action in the district court challenging the Comptroller of the Currency's

preliminary and conditional approval, pursuant to 12 U.S.C. 27, of the national bank charter application of the proposed Northwest National Bank.[1]

That approval was based upon an extensive administrative record, including the application and supporting data submitted by the applicants, a national bank examiner's report of his field investigation, the transcript of a public hearing before the Comptroller's Regional Administrator, submissions by petitioners and by members of the public, and the analysis and recommendations of the Comptroller's senior staff in Washington, D.C. (C.A. App. 24-62[2]).

After reviewing the administrative record, the district court concluded that the Comptroller's decision was arbitrary, capricious and contrary to law (Pet. App. 27-56). The court of appeals unanimously reversed, holding that there was sufficient evidence in the administrative record to support the Comptroller's decision, and that the district court had erred by independently weighing the evidence and reaching its own conclusions on the merits of the application, contrary to the standard of review established by *Camp* v. *Pitts*, 411 U.S. 138 (Pet. App. 57-71); *i.e.*, that the Comptroller's decision is not subject to the "substantial evidence" test, but may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 5 U.S.C. 706(2)(A).

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[1]The proposed bank intervened as a party defendant in the district court, and, like the Comptroller, successfully prosecuted an appeal from that court's adverse decision.

[2]"C A." refers to the Appendix filed in the court of appeals, a copy of which is being lodged with the Clerk.

1. Exercising his broadly-framed authority under the National Bank Act, 12 U.S.C. 26 and 27, the Comptroller granted preliminary approval of the challenged application. Petitioners do not claim that the approval was contrary to any provision of the Act, and they concede that the Comptroller's decision was within the scope of his discretion when considered in light of the submissions in the administrative record made by the proponents and opponents of the challenged application (Pet. 8-9). Rather, they assert that, in applying his own regulations (12 C.F.R. 4.2(b)) in the particular circumstances of this case, the Comptroller acted arbitrarily by failing to follow contrary recommendations of his subordinates and by allegedly failing to consider relevant "facts" in the administrative record developed by those subordinates. Those facts principally concern the character of certain of the applicants and proposed directors and officers (Pet. 13-16), which is one of the items as to which the Comptroller, under his regulations, "may conduct such investigation as he deems necessary or proper * * * ." 12 C.F.R. 4.2(b).[3]

A. As the court of appeals properly held, however, the fact that the Comptroller did not disapprove the application because of "[i]nnuendoes about self-serving propensities, speculative business practices and suspicions of shady practices" concerning some of the proposed directors does not mean that he ignored such crit-

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[3]The deficiencies now cited by petitioners concerning the character of the applicants were not specified in the complaint (C.A. App. 6-11). There petitioners complained of the Comptroller's failure to issue findings and an opinion, and challenged as arbitrary his determination that there was need for a new bank. Petitioners renew here the latter contention (Pet. 12-13, 22), but the court of appeals properly concluded, after reviewing the administrative record (Pet. App. 65-67), that there was "ample evidence * * * that the needs and convenience of the community would in fact be served by the establishment of the new bank" (*id.* at 70).

icisms or that his approval was arbitrary (Pet. App. 67-68).[4] The court noted that the favorable evidence concerning the directors was substantial (*id.* at 67), that the board consisted of men and women "of wide-ranging business and banking experience who possessed substantial personal financial strength" for the bank's area (*id.* at 67-68), and that there was a "hard record of a reasonably experienced and balanced board of citizens with deep roots in the community * * * " (*id.* at 68). That ruling does not warrant review by this Court.

B. There is no merit in petitioners' related contention that, because the Comptroller disagreed with certain recommendations of his subordinates, he necessarily disregarded or failed to consider relevant facts (Pet. 8-16). As the court of appeals noted, it clearly "lies within the Comptroller's broad discretion to accept or reject the views of his subordinates as he sees fit" (Pet. App. 70). In reaching his own judgment, the Comptroller had before him the entire administrative file, including the examiner's report and the Deputy Comptroller's memoranda, the latter of which, while recommending approval, specifically pointed out the examiner's and other subordinates' unfavorable recommendations and negative conclusions (C.A. App. 56-57).[5]

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[4]The administrative record indicates that petitioners were apparently the sources for a number of the derogatory comments about the directors (C.A. App. 44-45).

[5]The portion of the Deputy Comptroller's memorandum quoted by petitioners (Pet. 12) does not purport to summarize the findings of the subordinate staff members with respect to the need for the proposed bank and its convenience to the public, but simply pointed to an observation that he believed significant. In a subsequent memorandum that did summarize the other staff recommendations, the Deputy Comptroller noted that the Regional Administrator had "concurred with the opinion of the investigating national bank examiner * * * that the applied-for bank would not satisfy the needs and convenience of the banking public" (C.A. App. 56).

The Comptroller's disagreement with the unfavorable recommendations in the administrative record before him does not disturb the presumption of regularity or indicate that he failed to consider them. He is entitled to place different weights than did his subordinates on the competing policy considerations in a particular case. Compare *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, No. 73-1055, decided December 23, 1974, slip op. 15-17.

2. Petitioners invite this Court to establish a new rule of judicial review under which courts of appeals, in reviewing district court decisions assessing the validity of agency action, should give special deference to the district court's decision and should limit themselves to determining whether the district court made a "fair assessment" of the issues (Pet. 20). Citing no conflict with the court of appeals' rejection of this limited standard of review (Pet. App. 60-61),[6] which petitioners had not urged below,[7] they rely (Pet. 19-20) upon Justice Frankfurter's opinion in *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503, limiting the scope of this Court's review of court of appeals decisions reviewing orders of the Labor Board.

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[6]There is no conflict with the decision in *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223 (C.A. D.C.), certiorari denied, 414 U.S. 1001, from which petitioners selectively quote language (Pet. 18-19) suggesting that the scope of court of appeals review in a case like this should be limited. In the portions of the opinion omitted by petitioner (quoted in Respondent Bank's Brief, pp. 8-9), the District of Columbia Circuit gave substantial reasons for its refusal to adopt such a rule.

[7]Petitioner contended below that the court of appeals' review was limited by the "clearly erroneous" standard of Rule 52(a), Fed. R. Civ. P., but they do not challenge here the court of appeals' rejection of that contention (Pet. App. 60).

That principle, however, applies to the question whether an agency's factual determinations are supported by "substantial evidence" and, even then, does not limit review where the lower court "applied an erroneous standard of review or grossly misapplied the correct standard * * *." *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 421 (Frankfurter, J., dissenting); *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Here, the court of appeals found that the district judge had exceeded the "narrow limits" on his reviewing authority (Pet. App. 71), in that he "independently weighed the evidence and reached his own conclusions" (*id.* at 69), and the *Pittsburgh S.S.* rule would not have applied in any event.

The decision below is consistent with this Court's decision in *Camp* v. *Pitts, supra*, 411 U.S. at 142, and the decisions of other courts of appeals (*e.g., Bank of Commerce of Laredo* v. *City Nat'l Bank of Laredo*, 484 F.2d 284, 287 (C.A. 5); *First Nat'l Bank of Crown Point* v. *Camp*, 463 F.2d 595, 599-600 (C.A. 7); *Ramapo Bank* v. *Camp*, 425 F.2d 333, 347-348 (C.A. 3), certiorari denied, 400 U.S. 828), holding that the focus of judicial review is on whether the Comptroller's action is inconsistent with law or is so unsupported by the administrative record as to be "arbitrary." A district court's conclusion on those issues is entitled to no special deference beyond that warranted by the force of its reasoning.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.